IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 531 OF 1988

1. Rau Gautam Landge.
2. Devaba Gautam Landge. ... Appellants.

Versus.

Prabhakar Yadavrao Patil. ... Respondent.

Shri V.A.Sugdare holding for Shri V.A.Thorat for the Appellants.

Shri Abhijit Kulkarni holding for Shri A.A.Kumbhakoni for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 19th January, 2005.

ORAL JUDGMENT.

1. On September 25, 1988, the Second Appeal was admitted by passing the following order:

> "Second Appeal Admitted - the Substantial question of law being whether the suit property was rightly held to be joint family property."

I have heard the learned Counsel appearing for the parties on the aforesaid substantial question of law.

2. The Appeal is preferred by the original Defendants in a suit for perpetual injunction. The case of the Respondent/Plaintiff in short is that 1/2 portion on the western side of the land bearing Gat No.357 of village Dahiwadi was originally belonging to Hambirrao Landge and Savala Landge. The Respondent/Plaintiff agreed to purchase 1/2 portion by an agreement for sale dated 30th July 1977 executed in favour of the Respondents/Plaintiff. According to the Respondent he was put in possession of the said 1/2 portion on the western side. Hambirrao executed a sale deed in respect of his share in the suit property in favour of the Respondent. However, his brother Savala refused to execute the sale deed and therefore, the Respondent was required to obtain sale deed by filing a suit for specific performance of agreement. The case of the Respondent is that the Appellants have no concern with the suit land and as the Appellants started obstructing the possession of the Respondent, a suit for perpetual injunction was filed.

3. The suit was resisted by the Appellants by filing their written statement. Their contention is that their grand father Eknath purchased the suit land. After the death of Eknath, names of the Appellants' father Gautam and their uncles Maruti and Kondiba ought to have been

entered as legal representatives of the deceased Eknath in the Revenue records. However, entries were made in the Revenue records in the name of Hambirrao and Savala.

4. The learned trial Judge passed a decree for injunction. The learned trial Judge held that the Respondent has established that he was in possession of the suit land. The Appeal preferred by the Appellants to the District Court has been dismissed.

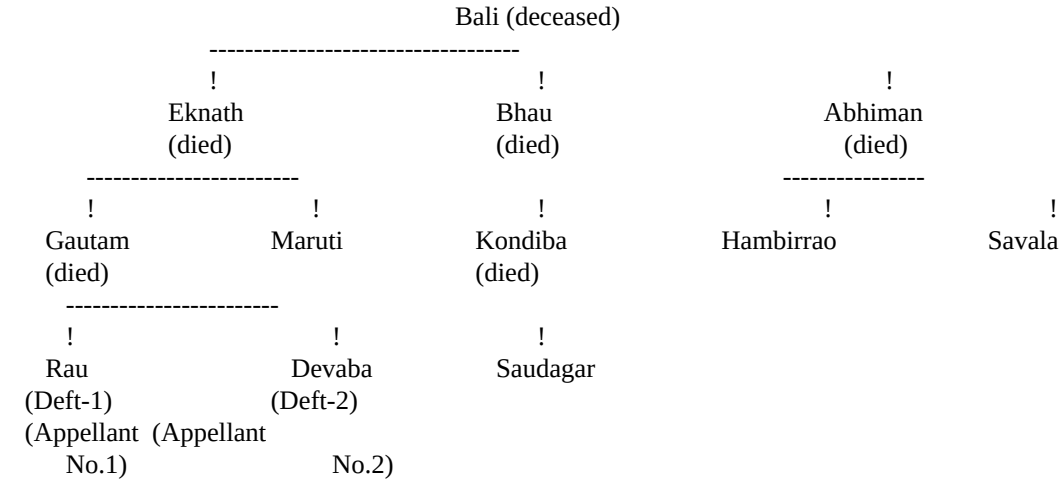
5. The learned Counsel appearing for the Appellants submitted that it is an admitted position that the suit land was purchased in the name of Eknath on 14th May 1946 and 12th June 1927. He submitted that a finding has been recorded by the Appellate Court that there was no partition of the estate amongst Eknath and his two brothers i.e. Bhau and Abhiman before the suit land was purchased. He pointed outthat the vendors of the Respondent were the sons of Abhiman. The learned Appellate Court held that the Respondent has established his exclusive possession and title over the suit land and therefore, he confirmed the decree of the trial Court. The learned Counsel submitted that on the basis of the findings recorded by the Appellate Court itself, the decree of the trial Court is required to be set aside as predecessor of the Respondent had no exclusive right, title and interest in the suit land and at the

highest they were the co-owners. He further submitted that the Respondent has at the most stepped into the shoes of the co-owners. Relying upon the various precedents, reference to which will be made later on, he submitted that Eknath was co-owner of the suit land along with Humbirrao and Savala and therefore, decree for perpetual injunction could not have been passed against the co-owners.

6. The learned Counsel appearing for the Respondent submitted that the finding recorded by the Appellate Court is that there was no partition amongst Eknath and his brothers in the year 1920. He submitted that the Revenue records clearly indicates that the Respondent was in exclusive possession. He submitted that even assuming that the predecessors of the Respondent were co-sharers, as the Respondent has obtained possession of the suit land, it was for the Appellants to file a suit for partition and recovery of possession from the Respondent.

7. I have considered rival submissions. In paragraph 9 of the Judgment, the Appellate Court has noted the contention raised by the Appellants in the Written Statement that there was a partition amongst Eknath and his two brothers in the year 1920. The Appellate Court also noted that the suit land was purchased in the name

of Eknath i.e. grand father of the Appellants in the year 1927 and 1946. The genealogy showing the relationship between the parties is as under:



In paragraph 10 the Appellate Court has recorded the following findings:

> "If after 1920 Shri Eknath and his two brothers had started enjoying the joint family property separately, the Defendants could have adduced the evidence to that effect but when no such evidence is forthcoming it will have to be presumed that Shri Eknath and his two brothers continued their joint family. Shri Eknath was the eldest brother amongst the three and therefore, it is but natural that the lands belonging to the joint family would stand in his name alone. If the Defendants want to say that the suit property was

purchased by Shri Eknath with his own income after he started living separate, the Defendants ought to have adduced some sort of evidence to prove the source of Shri Eknath's income with which Shri Eknath purchased the suit property. From the peculiar facts of the present case, the only probable thing is that there would not have been partition of the estate amongst Shri Eknath and his two brothers before the suit land was purchased. Shri Eknath's two brothers predeceased him. Till Shri Eknath was alive, the land block No.357 might have been enjoyed peacefully by the Plaintiff's transferors and sons of Shri Eknath and, therefore, there did not arise any question, as to in whose name the suit land stood to the revenue record. The dispute arose only after the death of Shri Eknath. The dispute even did not arise after the death of Shri Eknath when the Plaintiff's transferors and the Defendants were shown as sharer in the suit land to the revenue record. From the mutation extract (Exhibit 33) it is seen that in the year 1967 the mutation was effected deleting the name of Shri Eknath and recording the names of his sons and the Plaintiff's transferors."

Thus the Appellate Court has held that in the year 1967

the mutation was effected in the revenue records deleting the name of Eknath and recording the names of his sons and the predecessors of the Respondent. This finding of the Appellate Court itself makes it very clear that the predecessors of the Respondent were co-sharers along with the deceased Eknath.

8. It will be necessary to refer to certain decisions relied upon by the learned Counsel appearing for the Appellant. The learned Single Judge of this Court in a Judgment reported in AIR 1996 Bombay page 36 (Prakash S.Akotkar and another v/s. Mansoorkha Gulabkha and others) held that:

> "Having found the character of possession as co-owner, as indicated above, the only question that arises for determination is, whether a co-owner in possession is entitled to an injunction of this nature against the other co-owners. Once it is found that the possession of co-owner is for and on behalf of other co-owners, the other co-owner cannot claim injunction of this nature so as to exclude the other co-owners from exercising their right as co-owners."

The same is the view taken by the Division Bench of the

Punjab and Haryana High Court in a Judgment reported in AIR 2001 Punjab and Haryana page 112 (Bachan Singh v/s. Swaran Singh). Reliance is also placed on the Judgment of the Apex Court reported in AIR 1981 S.C. page 77 (Karbalai Begum v/s. Mohd.Sayeed & another). If according to the findings recorded by the Appellate Court Eknath happened to be a co-sharer along with the predecessors of the Respondent, the perpetual injunction could not have been granted so as to oust the Appellants who are legal representatives of the deceased Eknath. The Appellants are also co-sharers in respect of the suit land. In so far as the submission of the learned Counsel for the Respondent that the Respondent had obtained possession on the entire suit land is concerned, it is very difficult to accept the said submission as even after the year 1967 the names of the sons of Eknath were appearing in the Revenue records.

9. Thus the Respondent is not entitled to the perpetual injunction against the Appellants who are co-sharers of the suit proeprty along with him. Hence the decree passed by the trial Court and confirmed by the Appellate Court cannot be sustained and deserves to be quashed and set aside.

10. The Second Appeal is accordingly allowed. The impugned Judgments and Decrees are quashed and set aside

and Regular Civil Suit No.4 of 1981 filed by the Respondent stands dismissed. There will be no order as to costs.

Judge.